

PRICE & BRUMFIELD, LLP  
Robert H. Brumfield, III, Esq., SBN 114467  
Kimberly A. Ungar, Esq., SBN 200963  
Greystone Plaza Building  
841 Mohawk Street, Suite 200  
Bakersfield, CA 93309  
(661) 323-3400

Attorneys for Creditor, Santos Gonzalez Herrera

IN THE UNITED STATES BANKRUPTCY COURT  
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

In re  
PACIFIC GAS AND ELECTRIC COMPANY,  
a California corporation,  
Debtor.  
Federal LD No 94-0742640

Bky No 01-30923 DM

Chapter 11

NOTICE OF MOTION AND  
MOTION FOR RECONSIDERATION  
OF ORDER DISALLOWING CLAIM  
OR ALTERNATIVELY, TO EXTEND  
TIME TO FILE PROOF OF CLAIM,  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION

Date November 27, 2002  
Time 9:30 a.m.  
Dept. 22

To Debtor, Pacific Gas and Electric Company, and to its attorney of record.

NOTICE IS HEREBY GIVEN that, on November 27, 2002, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Department 22 of the United States Bankruptcy Court for the Northern District of California, located at 235 Pine Street, 19th Floor, San Francisco, California, Claimant, Santos Gonzalez Herrera, will, and hereby does, move for reconsideration of the Order Disallowing Claim which the above-entitled court entered on June 28, 2002, and for revocation of that Order and allowing the claim, or alternatively, that the court allow the late filing of Claimant's claim. The motion is made on the ground that a cause exists under Federal Bankruptcy Rule 3008 which allows a party-in-interest to seek reconsideration of an order of a court which disallows a

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INTRODUCTION

Santos Gonzalez Herrera ("Mr. Herrera" herein) hereby requests that the court reconsider its Order on Debtor's Omnibus Objection to Late-Filed Claims ("Order" herein) entered on or about June 28, 2002, wherein the court disallowed Mr. Herrera's claim for damages sustained as the result of personal injuries caused by the Debtor Pacific Gas and Electric Company, a California corporation ("PG&E" herein)

Accol Add: KidsDgcMail Center

claim

The motion is based on this Notice of Motion and the Memorandum of Points and Authorities served and filed concomitantly herewith, on the records and file herein, and on such evidence as may be presented at the hearing on the motion.

If you wish to oppose this Motion, you must file a written response with the Bankruptcy court and serve a copy of it upon the Claimant's attorney at the address set forth above no less than fourteen (14) days preceding the noticed date of hearing. If you fail to file a written response to this Motion within such time period, the court may treat such failure as a waiver of your right to oppose the Motion and may grant the requested relief.

Dated: October 18, 2002

PRICE & BRUMFIELD, LLP

By *Robert H. Brumfield, III*  
ROBERT H. BRUMFIELD, III,  
Attorneys for Creditor, Santos Gonzalez  
Herrera

NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY, TO EXTEND TIME TO FILE PROOF OF CLAIM;  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

II.

CAUSE EXISTS FOR THE COURT TO EXERCISE

ITS DISCRETION TO RECONSIDER

ITS ORDER DISALLOWING MR. HERRERA'S CLAIM

Reconsideration of any order that disposes of a claim may be sought. Bankruptcy Rule, 3008 and 11 U.S.C. § 502(j). A court may reconsider the disallowance of a claim "for cause". Bankruptcy Rule, 3008. What constitutes cause is not defined with precision, however, courts have considered such factors as new evidence, cause existing under the applicable standards for a reversal of the order, or that a manifest injustice has been done. Courts have also applied the excusable neglect standard set forth in Bankruptcy Rule, 9006 in determining whether to grant reconsideration of an order. 9 Collier on Bankruptcy, 15<sup>th</sup> ed. revised, Chapter 3008, paragraph 3008 01[4].

The Ninth Circuit has looked to Bankruptcy Rule, 9024, which incorporates Federal Rule of Civil Procedure 60, for a definition of cause for reconsideration<sup>1</sup>. Federal Rule of Civil Procedure 60 states that relief from an order may be granted due to: "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud or misrepresentation, or other misconduct by an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment."

There are several reasons that this court should reconsider its Order disallowing Mr. Herrera's claim, all of which should more than suffice under any of the standards listed above. In opposition to PG&E's Omnibus Objection, Mr. Herrera's attorney filed only a vaguely titled declaration<sup>2</sup>. No Memorandum of Points and Authorities was filed in support of Mr. Herrera's "opposition". It is entirely possible that the court was not even aware of Mr. Herrera's "opposition"

<sup>1</sup> See *U.S. v. Levy* (In re Levy), 182 B.R. 827 (9<sup>th</sup> Cir. BAP 1995), *S.G. Wilson Co., Inc. v. Cleanmaster Industries, Inc.* (In re Cleanmaster Industries, Inc.), 106 B.R. 628, 630 (9<sup>th</sup> Cir. BAP 1989).  
<sup>2</sup> A true and correct copy of which is attached hereto as Exhibit "A", and judicial notice of the same is requested under Federal Rule of Evidence 201.

ATTORNEYS AT LAW  
BREYER PLAZA BUILDING  
800 HENRIE STREET, SUITE 500  
Bakersfield, California 93308-1800  
TEL 805-328-4000

1 because it was not made in proper and adequate form or with a clear title indicating the nature and  
2 purpose of the document. Further, no appearance for Mr. Herrera was made at the hearing on the  
3 Omnibus Objection and no oral argument was presented on his behalf. The circumstances  
4 surrounding the late filing of his claim and the actual nature of his claim, had they been presented  
5 properly to the court, and had counsel been present to address the court's concerns at the hearing,  
6 should have caused the court to deny PG&E's Omnibus Objection as to Mr. Herrera's claim.

7 Mr. Herrera is entitled to reconsideration of the court's Order disallowing his claim on the  
8 grounds of mistake, inadvertence and excusable neglect and other reasons justifying relief from the  
9 Order.

10  
11 III.  
12 EXCUSABLE NEGLIGENCE WARRANTS RECONSIDERATION OF THE  
13 COURTS ORDER AND ALLOWING MR. HERRERA'S CLAIM OR  
14 EXTENDING THE TIME FOR HIM TO FILE HIS PROOF OF CLAIM

15 Excusable neglect occurred on two levels. The first incidence was that Mr. Herrera's  
16 attorney filed a late Proof of Claim in the PG&E bankruptcy. The second occurrence was the  
17 attorney's failure to present a sufficient opposition to the Omnibus Objection. Mr. Herrera has a  
18 formidable opposition to offer but it was not truly before the court.

19 The failure of Mr. Herrera's counsel to timely file a Proof of Claim constitutes "excusable  
20 neglect" within the meaning of Bankruptcy Rule 9006(b)(1). The United States Supreme Court has  
21 held that a lenient standard of "excusable neglect" found in Rule 9006 may be grounds for the  
22 extension of the time limit in considering whether to allow a late-filed claim. Pioneer Investment  
23 Services Co. v. Brunswick Associates, 507 US 380, 389, 113 S.Ct. 1489, 1495, 123 L.Ed. 2d 74  
24 (1993) ("Pioneer"). Pursuant to Pioneer, Rule 9006(b)(1) "grants a reprieve to out-of-time filings  
25 that were delayed by 'neglect'". The court in Pioneer also stated that Congress plainly permitted a  
26 court to accept late filings caused by inadvertence, mistake, or carelessness. Under Pioneer, the  
27 court is to undertake an equitable inquiry addressing:

28 "The danger of prejudice to the debtor, the length of the delay and its potential  
impact on judicial proceedings, the reason for the delay, including whether it was  
within the reasonable control of the movant, and whether the movant acted in good

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BREYER PLAZA BUILDING  
800 HENRIE STREET, SUITE 500  
Bakersfield, California 93308-1800  
TEL 805-328-4000

1 control of the movant, (4) whether the movant acted in good faith, (5) whether the client should be  
2 penalized for the mistakes of their counsel, and (6) whether the claimant has a meritorious claim.

3 PG&E would not be prejudiced if this one contingent claim were allowed. It is highly  
4 doubtful that PG&E has altered its position or that the other creditors will be impacted if  
5 Mr. Herrera's claim is allowed. The level of complexity of PG&E's bankruptcy administration  
6 renders Mr. Herrera's claim inconsequential in the scheme of things, but it is very significant and  
7 dire to Mr. Herrera. Further, allowance of Mr. Herrera's claim will have no impact on PG&E's  
8 ability to confirm a feasible Chapter 11 Plan. Also, PG&E was well aware of Mr. Herrera's claim as  
9 the superior court litigation<sup>3</sup> had been pending for some time and was nearing trial when PG&E  
10 filed bankruptcy.

11 The delay in filing Mr. Herrera's Proof of Claim was relatively brief. Once Mr. Herrera  
12 realized the problem existed regarding the late Proof of Claim, Mr. Herrera retained new counsel to  
13 handle the matter and a Proof of Claim was filed on his behalf on or about November 21, 2001,  
14 approximately two and a half months after the bar date. This delay should not have any impact on  
15 the inherently complex judicial proceedings already required of the bankruptcy court in the PG&E  
16 case. In Dix, there was a two-year delay in filing a proof of claim and the court still extended the  
17 time to file the proof of claim because it would not impact efficient court administration. Dix v.  
18 Johnson, supra, at 138.

19 The reasons for the delay are simply neglect and mistake by Mr. Herrera's attorney. These  
20 reasons were not within control of Mr. Herrera who is likely of minimal legal sophistication and  
21 who relied on his attorney to protect his interests in the superior court action against PG&E. Even if  
22 Mr. Herrera's choice of attorney's was within his control, this does not foreclose relief under this  
23 Motion according to any of the potentially applicable standards. See In re Paul, 101 B.R. 228, 231  
24 (S.D. Cal. 1989). Mr. Herrera acted in good faith and had nothing to gain and much to lose from  
25 filing a late Proof of Claim. He is simply attempting to move forward in obtaining relief for his  
26 injuries.

27 Mr. Herrera should not be penalized for the mistakes or neglect of his attorney. Although  
28

<sup>3</sup> Herrera v. Pacific Gas & Electric, Inc., filed in the Superior Court for the County of Fresno, Case No. 640139-2.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY, TO EXTEND TIME TO FILE PROOF OF CLAIM

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faith." Id. at 395.

1 A court has the broad power to allow a late-filed claim even upon carelessness of counsel to  
2 timely file a Proof of Claim. Id. at 389. The Ninth Circuit court case, Dix v. Johnson, 95 B.R. 134  
3 (9<sup>th</sup> Cir. 1988), stated that when disallowance of a late-filed claim forecloses a trial on the merits of  
4 that claim, a liberal construction of excusable neglect should be applied. In the context of  
5 Mr. Herrera's claim, he has been foreclosed of a trial on the merits. Hence, the Court and the Court  
6 of Appeals for the Ninth Circuit mandate the application of a lenient definition of excusable neglect  
7 that allows a creditor's claim even if his attorney is at fault and the creditor is considered to have  
8 some fault for choosing that attorney. Application of a strict excusable neglect standard would be  
9 an abuse of discretion in these circumstances.

10 Mr. Herrera's claim is for personal injury damages in a superior court case that was nearing  
11 trial. PG&E was well aware of that case and defending the same when it filed bankruptcy shortly  
12 before the trial date which stayed the superior court action. Mr. Herrera has been foreclosed from  
13 any compensation for his injuries alleged to be approximately \$750,000 because his attorney filed  
14 the Proof of Claim form after the bar date. The excusable neglect analysis is available to  
15 Mr. Herrera and should be seriously considered by the court. This is especially true given the  
16 seventy of the penalty leveled upon by Mr. Herrera as a result of disallowance of his claim in a very  
17 large bankruptcy with a temporarily insolvent, soon to be reorganized, debtor with a huge amount of  
18 assets.

19  
20 IV.  
21 THE EQUITIES OF THIS MATTER MILITATE IN FAVOR OF  
22 RECONSIDERATION OF THE COURTS ORDER AND ALLOWING MR.  
23 HERRERA'S CLAIM

24 The United States Supreme Court could not have been clearer that attorney mistake and/or  
25 neglect could be a basis for allowing a late-filed claim when other equitable factors weigh in favor  
26 of the creditor. When determining whether neglect is "excusable" under 60(b)(1), courts generally  
27 consider: (1) the danger of prejudice to the debtor; (2) the length of delay and its potential impact  
28 on judicial proceedings; (3) the reasons for the delay, including whether it was within the reasonable

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1 the majority in Pioneer held that attorney mistake is not enough to allow a late-filed claim, attorney  
2 mistake or neglect along with consideration of the equitable inquiry militate squarely in favor of  
3 reconsideration of Mr. Herrera's claim and with ultimate allowance of his claim. Congress and the  
4 United States Supreme Court clearly provided that under circumstances as are before the court on  
5 this Motion, warrant the court to grant Mr. Herrera relief from its order disallowing Mr. Herrera's  
6 claim and not to permanently foreclose relief for Mr. Herrera's injuries.

7 Lastly, Mr. Herrera has a meritorious claim against PG&E. Many of the facts involved in  
8 the superior court case were not in dispute. The undisputed facts show that a PG&E employee erred  
9 in preparing and/or reading a map of gas pipelines on property where Mr. Herrera was hired to  
10 work. When PG&E personnel went to the mistaken location, they noted no underground gas  
11 pipelines and reported such to the landowner. Mr. Herrera relied on PG&E's representations that  
12 there were no gas pipelines where Mr. Herrera intended to conduct his work. This representation  
13 turned out to be a grave error. When Mr. Herrera began trenching the soil in the first row on the  
14 property, his tractor struck and ruptured an unmarked 16" gas pipeline that was pressurized at 680  
15 lbs. per square inch. The resulting explosion lifted the 50-ton tractor three to four feet off the  
16 ground and threw Mr. Herrera. The explosion was heard for miles. As the result of the explosion,  
17 Mr. Herrera suffered severe chest and back pain, initial hearing and breathing trouble and continuing  
18 back, leg and ankle pain. Mr. Herrera was ultimately diagnosed with severe and degenerative disc  
19 injury and underwent surgery to attempt to alleviate his pain. He has had extensive physical therapy  
20 and continued care but is permanently disabled. A psychological toll has accompanied  
21 Mr. Herrera's permanent disability due to persistent pain, his inability to support his family and his  
22 deeply impacted quality of life. At the very least, PG&E is responsible to some degree for  
23 Mr. Herrera's injuries and hence his claim is meritorious.

24 PG&E is taking full advantage of the laws under Chapter 11 of the Bankruptcy Code in  
25 order to reorganize and stay in business. Mr. Herrera should likewise be able to utilize the  
26 applicable laws to obtain relief in this matter. Although the Bankruptcy rules are generally designed  
27 to provide relief to the debtor, Bankruptcy Rule 9006 and 3008 were drafted with the intention and  
28 clear language granting relief to a creditor in just such a situation as is before the court on this

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY, TO EXTEND TIME TO FILE PROOF OF CLAIM

1 Motion.

V

CONCLUSION

Based upon the foregoing, Mr. Herrera respectfully requests that the court grant this Motion for Reconsideration of its Order Disallowing Claim, or, alternatively grant Mr. Herrera an extension of time in which to file his Proof of Claim. Mr. Herrera also requests such other relief as the court, in its discretion, deems just and proper.

Dated: October 18, 2002

PRICE & BRUMFIELD, LLP

By

ROBERT H. BRUMFIELD, III  
Attorneys for Creditor, Santos Gonzalez  
Herrera

JOHN A. TELLO, ESQ.  
STATE BAR NO. 86589  
CHAIN, YOUNGER, COHN & STILES  
1430 Truxtun Avenue Suite 100  
Bakersfield, California 93301  
(661) 323-4000

FILED

MAY 29 2002

UNITED STATES BANKRUPTCY COURT  
SAN FRANCISCO, CA

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CASE NO. 01-30923 DM  
Chapter 11 Case

In re  
PACIFIC GAS & ELECTRIC COMPANY,  
a California corporation,  
Federal ID No. 940742640  
DECLARATION OF JOHN A. TELLO  
IN RESPONSE TO OMNIBUS  
OBJECTION AND OMNIBUS  
OBJECTION TO LATE-FILED  
CLAIMS [SANTOS GONZALEZ  
HERRERA]

I, JOHN A. TELLO, declare as follows:

1. I am an attorney duly licensed to practice law in all of the courts of the State of California, and am a partner in the law firm of CHAIN, YOUNGER, COHN & STILES, the original attorneys for plaintiff, SANTOS GONZALEZ HERRERA in the lawsuit filed in the Superior Court of

DECLARATION OF JOHN A. TELLO IN RESPONSE TO  
OMNIBUS OBJECTION

EXHIBIT A

Page 1 of 4

6771

California, County of Fresno, Case No. 640139-2 designated Santos Gonzalez Herrera vs Pacific Gas & Electric, Inc., et al

2. During the months of June, July and August and September, 2001, my office staff of four individuals was reduced to one (1) medical secretary who herself was a new employee in the department. This was due to staff resignations and to the departure of my longtime paralegal, Marie Weston, who took ill with cancer and never returned. Unfortunately, due to inadvertence and mistake, the Proof of Claim to be filed in response to the Notice of the Filing Deadline for Filing Proofs of Claim in re PACIFIC GAS AND ELECTRIC COMPANY, a California corporation debtor, Chapter 11 filing Case No. 01-30923 DM was not filed on September 5, 2001, as required. It was not until October, 2001 that my new paralegal discovered this error and brought it to my attention. By this time, I had been informed by Attorney Robert L. Slater that Plaintiff HERRERA had signed a Substitution of Attorney on October 5, 2001, substituting me out of the underlying case and substituting Attorney Slater in as Attorney of Record. I then forwarded the Notice of Hearing in the bankruptcy petition of PG & E to Attorney Slater on November 15, 2001. It is my understanding Attorney Slater filed the claim on or about November 21, 2001.

3. It is respectfully requested that SANTOS GONZALEZ HERRERA be given leave to file the late claim which occurred as a result of the above mistake and inadvertence by me in this matter and that he be granted relief from the Omnibus Objection to Late-Filed Claims filed against MR. HERRERA.

DECLARATION OF JOHN A. TELLO IN RESPONSE TO  
OMNIBUS OBJECTION

EXHIBIT A

Page 2 of 4

I DECLARE THE ABOVE TO BE TRUE UNDER PENALTY OF PERJURY EXCEPT AS TO THOSE ITEMS ATTESTED TO UPON INFORMATION AND BELIEF.

DATED May 22, 2002.

Respectfully Submitted,

CHAIN, YOUNGER, COHN & STILES

By John A. Tello  
JOHN A. TELLO, ESQ.

DECLARATION OF JOHN A. TELLO IN RESPONSE TO  
OMNIBUS OBJECTION

EXHIBIT A

Page 3 of 4

PROOF OF SERVICE BY MAIL--(1013a, 2015.5 C.C.P.)

(1) I am over the age of 18 years and not a party to the within action.

(2) My business address is 1430 Truxtun Avenue, Suite 100, Bakersfield, California, 93301.

(3) On May 22, 2002, I served a true copy of the following document entitled exactly DECLARATION OF JOHN A. TELLO IN RESPONSE TO CNIBUS OBJECTION AND CNIBUS OBJECTION TO LATE-FILED CLAIMS (SANTOS GONZALEZ HERRERA) by placing it in an addressed sealed as follows:

CARA J. FREY  
HOWARD, RICE, NEMEROVSKI, CANADY  
FALK & RABKIN  
Three Embarcadero Center 3<sup>rd</sup> Floor  
San Francisco, CA 94111-4065

ROBERT I. SLATER, ESQ.  
A Law Corporation  
16633 Ventura Boulevard Suite 1405  
Encino, CA 91436

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION  
235 Pine Street 22<sup>nd</sup> Floor  
San Francisco, California 94111

[X] (By Mail)

[ ] I deposited such envelope in the mail at Bakersfield, California. The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Bakersfield, California, in the ordinary course of business.

[X] (STATE) I declare, under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on May 22, 2002, at Bakersfield, California.

*Sally Felix*  
SALLY FELIX

PROOF OF SERVICE BY MAIL

EXHIBIT 11

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF KERN

I am employed in the County of Kern, State of California. I am over the age of 18 and not a party to the within action; my business address is 841 Mohawk Street, Suite 200, Bakersfield, California 93309

On October 18, 2002, I served the foregoing document described NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY, TO EXTEND TIME TO FILE PROOF OF CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION on the interested parties in this action by placing a true and correct copy thereof in sealed envelopes, addressed as follows

SEE ATTACHED LIST

X BY MAIL

I am "readily familiar" with the firm's practice regarding the collection and processing of correspondence for mailing. Under that practice, all correspondence is deposited in the United States mail, with postage thereon fully prepaid, at Bakersfield, California, on the same day it is collected in the ordinary course of business.

I caused such envelope(s), with postage thereon fully prepaid, to be deposited in the United States mail at Bakersfield, California. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one (1) day after the date such envelopes were deposited in the United States mail.

Executed on October 18, 2002, at Bakersfield, California.

BY PERSONAL SERVICE:

I caused such envelope(s) to be personally delivered by hand to the office(s) of the addressee(s)

Executed on October 18, 2002, at Bakersfield, California.

STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

X FEDERAL: I declare that I am employed in the office of a member of the bar of this Court, at whose direction the above-described service was made

*Leslie R. Gregory*  
LESLIE R. GREGORY

PROOF OF SERVICE NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF ORDER DISALLOWING CLAIM OR ALTERNATIVELY TO EXTEND TIME TO FILE PROOF OF CLAIM MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Adam A. Lewis  
Morrison & Foerster  
425 Market Street, 33rd Floor  
San Francisco, California 94105  
[Counsel for El Paso, Idaho Power]

Adolfo M. Corona  
Dowling, Aaron & Keeler  
6651 North Fresno Street, Suite 200  
Fresno, California 93710  
[Counsel for Westcal, Inc.]

Adrienne Vadell Sturges  
Sodexha Marriott Services, Inc.  
9801 Washington Boulevard, 12th Floor  
Gaithersburg, MD 20878

Alan Kolod  
Moses & Singer LLP  
1301 Avenue of the Americas  
40th Floor  
New York, NY 10019  
[Counsel for Bankers Trust Company]

Alan Z. Yudovsky  
Anne E. Wells  
Stroock & Stroock & Lavan LLP  
2029 Century Park East, Suite 1800  
Los Angeles, California 90067  
[Counsel for Sengra Energy Trading Corp.]

Alvin Makler  
Calpine Grumleaf, Inc.  
P.O. Box 11749  
Pleasanton, California 94588

Alexis S. Coll  
Simposon Thacher & Bartlett  
3330 Ellipse Avenue  
Palo Alto, California 94301  
[Counsel for Lehman Commercial Paper, Inc.]

Alan H. Iskowitz  
Donna M. Balbon  
Nessman, Guthrie, Knox & Elliott  
445 South Figueroa Street, 31st Floor  
Los Angeles, California 90071  
[Counsel for City of Redwood City, California]

American State Bank and Trust Company  
P.O. Box 1446  
Williston, North Dakota 58802  
Attn: Patrick O. Sogard

AMROC Investments, LLC  
Attn: Chen Levine  
535 Madison Avenue, 15th Floor  
New York, NY 10022

Amy Hallman Rice  
Dorsey & Whitney LLP  
59 S. Sixth Street, Suite 1500  
Minneapolis, Minnesota 55402  
[Counsel for U.S. Bank Trust National Association]

Andrew N. Chas  
1177 West Loop South, Suite 900  
Houston, Texas 77027

Angela M. Alioto  
Law Offices of Joseph L. Alioto  
and Angela Alioto  
700 Montgomery Street  
San Francisco, California 94111  
[Counsel for Frank Pingueto]

Ashen Orchard  
Sacramento Municipal Utility District  
6201 S. Street, Mail Stop B408  
Sacramento, California 95817

Arnold Wallenstein  
ThermoEcolec Corporation  
245 Winter Street, Suite 300  
Waltham, MA 02154

Aron M. Oliner  
Buchalter, Nemer, Fields & Younger  
333 Market Street  
San Francisco, California 94105  
[Counsel for CSAA and MBIA Insurance Corporation]

B. C. Barnham, Sr.  
County Counsel  
Attn: Jenn S. Bradley, Deputy  
1115 Truxtun Avenue, Fourth Floor  
Bakersfield, California 93301  
[Counsel for Phil Francy, Treasurer/Tax Collector for Kern County]

Bank of America National Trust and Savings Association  
Attn: Peggie Sanders  
1830 Gateway Boulevard  
Concord, CA 94520

Bank of America  
Attn: Clara Strand  
555 South Flower Street  
Mail Code CA9-706-11-21  
Los Angeles, CA 90071

Bank One  
Corporate Trust Administrators  
Attn: James Orr Romano  
Mail Code IL1 0126  
1 Bank One Plaza  
Chicago, IL 60670-0126

Bank One, NA  
Attn: Robert G. Bussa, Jane Bek  
Energy & Utilities  
Mail Code IL 1-0363  
Bank One Plaza  
Chicago, IL 60670

Bankers Trust Co. of California, NA  
Structured Finance Group  
Attn: Peter Becker  
4 Albany St., 10th Floor  
New York, NY 10006

Bankers Trust Co.  
Trustee Corp. Trust  
Safet Kalabovs  
4 Albany Street, 4th Floor  
New York, NY 10006

Bankers Trust Company  
Corporate Trust Services  
Attn: Safet Kalabovs  
4 Albany Street, 4th Floor  
New York, NY 10006

Ben Whitwell  
Whitwell & Embroff LLP  
202 N. Canal Drive  
Beverly Hills, California 90210  
[Attorney for California Power Exchange]

Bennett G. Young  
LeBoeuf, Lamb, Greene & MacRae, LLP  
One Embarcadero Center Suite 400  
San Francisco, California 94111  
[Counsel for Euron North America Corp and Euron Canada Corp.]

Beth Strydom, Director  
MBIA Insurance Corporation  
113 King Street  
Armonk, New York 10504

Bill Wong  
AMROC Investments, LLC  
535 Madison Avenue, 15th Floor  
New York, NY 10022

BMO Nesbitt Burns  
Attn: John Hache  
700 Louisiana, Suite 4400  
Houston, TX 77002

BNP Paribas  
Attn: Mark Renaud  
747 7th Avenue, 31st Floor  
New York, NY 10019

BNY Western Trust Company  
Attn: Rose Ruelos, Corp. Trust Administrator  
550 Kearny St., Suite 600  
San Francisco, CA 94108-2527

BNY Western Trust  
Attn: Mr. Todd Duncan  
700 South Flower, 5th Floor  
Los Angeles, CA 90017

BP Energy Co.  
Attn: Louis Anderson  
501 Westlake Park Blvd  
Houston, TX 77079

BP Energy Company  
501 Westlake Park Boulevard  
Houston, Texas 77079  
Attn: Ken McClanahan

Bruce L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Mirant Corporation]

Bruce Bennett, Esq.  
Bennett J. Murphy, Esq.  
Henningsen Bennett & Dorman  
601 South Figueroa St., Suite 3300  
Los Angeles, CA 90017  
[Counsel for Sengra and Southern California Gas Company]

Bruce R. Worthington  
Senior Vice President and General Counsel  
PG&E Corp.  
One Market, Spine Tower, Room 2426  
San Francisco, California 94105

Bruce W. Leaverton  
Mary J. Heston  
Lane Powell Spears Lubersky LLP  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101

[Counsel for Mod-Sat Cogen, Colinda Cogen, Co., Salinas River Cogen Co., and Sargent Canyon Cogen, Co.]

Bryce Krikauer, Esq.  
Sidle & Austin  
One First National Plaza  
Chicago, IL 60601  
[Attorney for Bank of America, Admin. Agent]

Bryant Danner  
Southern California Edison  
2244 Walnut Grove Ave.  
Rosemead, CA 91770

California Farm Bureau Federation  
2100 River Plaza Drive  
Sacramento, California 95833

California Independent System Op.  
Margaret A. Rostker  
P.O. Box 639014  
Folsom, CA 95603-9017



1	Geoffrey T. Hitz The Hitzman Center, Suite 1800 San Francisco, California 94111	Harold L. Kachas The Kachas Center Metairie, Louisiana 70002
2	George O'Brien Vice President and Treasurer Intertec, Inc. 3077 Keller Springs Road Addicks, Texas 75001	Grady, Carson & Douglas 321 North Clark Street, 34th Floor Chicago, IL 60610 [Counsel for Indenture Trustee for 7.90% Deferrable Interest Subordinated Debentures Series A]
3		
4		
5	Gerald T. Bulwinkle General Counsel Burns & McDonnell Engineering 9400 Ward Parkway Kansas City, Missouri 64114 [Counsel for Burns & McDonnell Engineers]	Heather Brown Ward Brown, Manning and Thieling Co. One Willamette Center, Suite 4100 Tulsa, OK 74172
6		
7		
8	Ogden Power Company LLC P.O. Box 17169 Pittsburg, CA 94518	Henry Brudler Robert G. Harris Brudler & Mailer 2775 Park Avenue Santa Clara, California 95050 [Counsel for Cogesat Services (California), Inc.]
9		
10	Glen M. Rasmussen Two Corporate Drive P.O. Box 661 Shelton, CT 06484 [Counsel for GE Power Systems and GE Supply Divisions]	Herbert Katz Kelly Lyttton & Vran LLP 1300 Avenue of the Stars, Suite 1450 Los Angeles, California 90067 [Counsel for Chiryl Ann Acosta]
11		
12	Gordon P. Engstrom Morrison & Foerster LLP 101 Ypanema Valley Road, Suite 450 P.O. Box 8130 Walnut Creek, California 94596 [Counsel for AES New Energy, Inc.]	Hedden Russ LLP Adam Strubom L. Vinsky Esq. One M&T Plaza, Suite 2000 Buffalo, New York 14203
13		
14		
15		
16	Guent Kelling City of Palo Alto P.O. Box 10250 Palo Alto, California 94303	Howard J. Weg Peterson, Glazerman & Weg 1301 Avenue of the Stars, Suite 1225 Los Angeles, California 90067 [Counsel for Power Corp.]
17		
18	Gregory Clore 323 Market Street, Suite 1100 San Francisco, California 94105 [Counsel for N&S Cogeco, Coalcoya Coyne, Co., Salinas River Cogeco Co. and Sargent Cogeco Coyne, Co.]	Howard Surman Duckert Spradling & Metzger 401 West A Street, Suite 2400 San Diego, California 92101 [Counsel for Alamos - Midwest, Ltd.]
19		
20		
21	Gregory W. Jones El Paso Merchant Energy 1001 Louisiana, Suite 2714B Houston, Texas 77002	Hydes R. Feldman Cynthia M. Cohen Paul, Hastings, Janofsky & Walker LLP Twenty Third Floor 355 South Flower Street Los Angeles, California 90071 [Counsel for El Paso Energy, No Brive Roadline, Rio Grande, Texas, and El Paso Electric Company Limited Partnership The Tercero-Dominion Bank]
22		
23		
24	GWF Power Systems LP 4300 Railroad Ave. Pittsburg, CA 94565	Hydes R. Feldman Katherine A. Traizer Kelly Anna Paul, Hastings, Janofsky & Walker LLP Twenty Third Floor 355 South Flower Street Los Angeles, California 90071 [Counsel for Constellation Power Source, Inc.]
25		
26	H. Clayton Dabney McGurwood LLP 1001 Louisiana, Suite 2714B Houston, Texas 77002	
27		
28		

I Richard Levy  
Grated, Sanger & Levack, P.C.  
16109 Addison Road, Suite 140  
Addison, Texas 75001  
[Counsel for Babcock & Wilcox Company]

Ian Macdonald  
Macdonald & Associates  
1800 Avenue of the Stars, #179  
San Francisco, California 94111  
[Counsel for The Utility Reform Network (TURN)]

Isahn T. Amund  
Pacific Gas and Electric Company  
77 Beale Street  
San Francisco, California 94105

JCC Energy Corporation  
302 N. Market Street, Suite 500  
Dallas, TX 75202-1846  
Attn: Karl Butler

Internal Revenue Service  
P.O. Box 1318  
Fresno, CA 93188

Internal Revenue Service  
Spot Proc./Bankruptcy  
1301 Clay Street, Suite 1400  
Oakland, CA 94612

Internal Revenue Service  
Internal Revenue Agency Group 3  
1301 Clay Street, 1404S  
Oakland, California 94612

Irvig Sulmasy  
Victor A. Salin  
Frank V. Zeminyan  
Law Offices of Victor A. Salin,  
Frank V. Zeminyan, Benjamin & Rothman -  
300 South Grand Avenue, 14th Floor  
Los Angeles, California 90071  
[Counsel for Certain California Counties with Claims against PG&E]

Isabella M. Shapiro  
Shapiro & Shapiro  
Pacific Telephone Group  
2600 Camino Ramon, Room 4CS100  
San Ramon, California 94583

J Christopher Kennedy  
Irell & Manella LLP  
1300 Avenue of the Stars, Suite 900  
Los Angeles, California 90067  
[Counsel for party as interest]

J Christopher Kohn  
The American Center  
Brendan Collins  
Civil Division  
Department of Justice  
P O Box 875  
San Franklin Station  
Washington, D.C. 20044  
[Counsel for United States of America]

J Christopher Kohn  
Twey J. Winkler  
Brendan Collins  
Department of Justice  
1100 L Street, N.W. Room 10004  
Washington, D.C. 20005  
[Counsel for United States of America]

J Christopher Kohn  
White & Case LLP  
1155 Avenue of the Americas  
New York, NY 10036  
[Counsel for Obidie Energy LLC, Walham Energy LP,  
Martinez  
Cogent LP, KPS-Kunburg LP]

J Matthew Dermine  
Raikha Hoyman & DeWulf PLLC,  
One Arizona Center  
400 East Van Buren Street, Suite 100  
Phoenix, AZ 85004  
[Counsel for Tucson Electric Power Company]

Jack L. Taylor  
1289 Lincoln Road  
P.O. Box 1850  
Yuba City, California 95992  
[Counsel for James Bowditch]

James A. Raibon  
David Silverman  
Raibon & Alter LLP  
235 Elm Street, Suite 1600  
San Francisco, California 94104

James E. Spinto  
Robert Allen  
Chapman & Cutler  
111 W. Monroe Street  
Chicago, IL 60603  
[Counsel for Pacific Investment Management Company]

James L. Lopez  
Howard Rice, Nemeroff, Canady, Felt & Rubin  
Three Embarcadero Center, 7th Floor  
San Francisco, California 94111  
[Counsel for Pacific Gas and Electric Company]

James Mon  
James Mon Resources  
317 Noe Street  
San Francisco, California 94114  
[Counsel for The City and County of San Francisco]

1	James R. Thompson	Idaho Power Company 2211 Idaho Street Boise, Idaho 83725
2	James S. Morrice	Nixon Peabody LLP Two Embarcadero Center, Suite 2700 San Francisco, California 94111 [Counsel for SPZ, WestGroup, Inc. and Wilmington Trust]
3	James D. Block	Leadin Commercial Paper, Inc. 743 7th Ave., 3rd Floor New York, NY 10022
4	James Oates & Ellis LLP	55 California Street San Francisco, California 94105 [Counsel for PPI, Montana, LLC, Valley Tree Service, Fabre Company]
5	James Miller	Agency Center, LP Legal Department 243 California Street, Suite 200 Jacksonville, Florida 32202
6	Jeff St. Ouge	Empire Blue Cross Blue Shield One World Trade Center, 23rd Floor New York, NY 10048
7	Jeffrey D. Chandler	Jeffrey M. Wilcox Seymour Capital LLC 1000 Wilshire Blvd., Suite 600 Beverly Hills, California 90405 [Proposed Investment Banker to Commence]
8	Laure R. Butler	Kilpatrick & Lockhart 1231 Avenue of the Americas, 45th Floor New York, NY 10020 [Counsel for Wyndoff & Reed Advisors]
9	Jeffrey A. Davis	Gray Cary Ware & Freudenrich LLP 401 B Street, Suite 1700 San Diego, California 92101 [Counsel for International Brotherhood of Electrical Workers, Local 47 and Local 1245]
10	John P. Russell	Johnson Consulting and Marketing LLC 10777 Westgate, Suite 650 Houston, TX 77042
11	John A. Messel	2632 Larkin Street, Suite 0 San Francisco, California 94109 [Counsel for Frank Fragalejo]
12	John A. Vos, Attorney	1430 Lincoln Avenue San Rafael, CA 94901
13	John Chu	Corporate Counsel Law Group LLP Montgomery Street, Suite 100 San Francisco, California 94104 [Counsel for Bay Area Rapid Transit District]
14	John J. Shellbarger	Carrage Homes, Inc. Law Offices of John P. Shellbarger 923 Geary Street, Suite 3 San Francisco, California 94109 [Counsel for Carrage Homes, Inc.]
15	John P. Klingberg	LeBoeuf, Lamb, Greene & MacRae, LLP 125 West 55th Street New York, NY 10019 [Counsel for Enron North America Corp and Enron Canada Corp.]
16	John P. Dillman	Laurberger Heard Goggin Blair Graham Fenn & Sampson, LLP P.O. Box 3064 Houston, TX 77251
17	John P. Hart	The Fishbeck & Wilson Company 20 S. Van Buren Avenue P.O. Box 351 Baberton, Ohio 44209

Wesley K. Laubach  
Financial, McCarthy, Taylor & Finley  
San Francisco, California 94104  
Business, Telephone 770-10  
[Counsel for Sacramento Municipal Utility District]

John Robert Weiss  
215 West Monroe Street, Suite 1600  
Chicago, IL 60681  
[Counsel for Official Committee of Unsecured Creditors]

John T. Hansen  
Deborah H. Beck  
Neumann, Guthrie, Knox & Elliott  
30 California Street, 14th Floor  
San Francisco, California 94111  
[Counsel for Committee of 770-482 Retirees and Survivors and ESOP]  
Cham Acquisition LLC]

Jonathan Krasnhal  
Jon P. Scholz  
Jonathan Y. Thomas  
Suzanne M. Appel, LLC  
401 Montgomery Street, Suite 450  
Santa Monica, California 90401  
[Proposed Investment Banker to Committee]

Joshua S. Sieper  
Hansen, Bridgett, Marcus, Vlahos & Rusty LLP  
333 Market Street, Suite 2100  
San Francisco, California 94104  
[Counsel for Creditor Hansen, Bridgett, Marcus, Vlahos & Rusty LLP]

Joseph A. Eisenberg, Esq.  
Jaffer, Mangels, Butler & Marmaro  
1900 Avenue of the Stars, 7th Fl.  
Los Angeles, CA 90067  
[Agency for California Power Exchange]

Joseph A. Eisenberg, P.C.  
Victoria S. Kaufman  
Jaffer, Mangels, Butler & Marmaro LLP  
2121 Avenue of the Stars, Tenth Floor  
Los Angeles, CA 90067  
[Counsel for California Power Exchange Corp.]

Joseph J. Srolinski  
Chadbourne & Parke LLP  
30 Rockefeller Plaza  
New York, NY 10112  
[Counsel for El Dorado Hydrop and Rock Creek Limited Partnership]

Jon C. Blumstein  
Kent J. Schmidt  
Dorsey & Whitney LLP  
650 Tower Center Drive, Suite 1850  
Costa Mesa, California 92626  
[Counsel for US Bank National Association]

Julia Hill, County Counsel  
County of Santa Cruz  
Office of the Treasurer - Tax Collector  
901 Ocean Street, Room 303  
San Jose, California 95108  
[Counsel for County of Santa Cruz]

K. Bailey  
Bankruptcy Specialist  
General Motors Acceptance Corporation  
P O Box 173228  
Denver, CO 80217

Klara E. Thomas  
Bedley Singleton Chid  
510 Las Vegas Boulevard South  
Las Vegas, NV 89101

Karen Kasting Jahn, County Counsel  
Marina M. Kasting Jahn, County Counsel  
1815 Yuba Street, Suite 3  
Rialto, California 92401

Kathryn A. Coleman  
Dionne D. Cuchler LLP  
Gibson, Dunn & Cuchler LLP  
San Montgomery Street, Tishara Tower  
San Francisco, California 94104  
[Attorney for Creditor Merrill Lynch, Pierce, Fenner & Smith]

K3PC Bank  
Attn: Ivan Veronien  
315 So. Figueroa St., Suite 1920  
Los Angeles, CA 90071

Kelly Greiss McConnell  
Greiss Purley LLP  
277 North 6th Street, Suite 100  
Boise, ID 83702  
[Counsel for Windpower Partners, 1987, 1988, Allured and Wind, Inc. Windwright, Inc.]

Kenneth M. Greene  
Miller & Van Arman LLP  
400 Montgomery Street, Suite 501  
San Francisco, California  
[Counsel for Uniqued, Inc.]

Kenneth N. Elise  
David M. Stern  
Michael L. Tuckman  
Klein, Tuckman, Bortolotto & Stern LLP  
1880 Century Park East, Suite 200  
Los Angeles, California 90087  
[Counsel for POSDEF Power Company, LP]

Kenneth N. Elise  
David M. Stern  
Michael L. Tuckman  
Klein, Tuckman, Bortolotto & Stern LLP  
1880 Century Park East, Suite 200  
Los Angeles, California 90087  
[Counsel for POSDEF Power Company, LP]







William Energy Marketing & Trading Co. (Canada)  
One Williams Center, 19th Floor  
New York, NY 10036  
P.O. Box 2848  
Tulsa, Oklahoma 74101  
Attn: Kelly Knowlton

Zack Sturdevant  
Minnet Corporation  
1155 Perimeter Center West  
Atlanta, GA 30338

Zuckerman-Mendelsohn, Inc.  
P.O. Box 487  
Stockton, California 95201

Lawrence M. Jacobson  
Glickfeld, Fields & Jacobson LLP  
3400 Wilshire Boulevard, 15th Floor  
Los Angeles, California 90010  
[Counsel for Tishman Construction Corporation of California]

W. Kates Eckert  
Edert, Beason & Associates  
4711 Highway 17 South, Suite 3  
Orange Park, Florida 32073  
[Counsel for Credit Andante Banker]

Kennedy Smith  
Potter Valley Irrigation District  
Post Office Box 186  
Potter Valley, California 94095

Ardis Aguilera  
Greg Cabral  
Michael Edison  
California Public Utilities Commission  
Legal Division  
305 Van Ness Avenue  
San Francisco, CA 94102

Joseph W. Corcoran, Jr.  
Law Offices of Joseph W. Corcoran, Jr.  
601 Bowler Avenue  
P.O. Box 3389  
Redwood City, California 94064  
[Counsel for Greg Hyman]

David R. Kahn  
Amy Miller Ravel  
Deputy Counsel  
County Government Center, East Wing  
70 West Hedding Street, Ninth Floor  
San Jose, California 95110  
[Counsel for County of Santa Clara]

Kimberly S. Wink  
Meyer, Brown, Rowe & Maw  
350 South Grand Avenue, 25th Floor  
Los Angeles, California 90071  
[Counsel for Am Energy LLC]

Washington State Energy Co. Inc.  
18011 Main Street  
Tacoma, WA 98407

White & Case, LLP  
Attn: Neil Millard  
633 West Fifth St., Suite 1900  
Los Angeles, CA 90071-2007  
[Attorney for BNY Western Trust Company]

White & Case, LLP  
Attn: Neil Millard/C. Randolph Fishman  
633 West Fifth St., Suite 1900  
Los Angeles, CA 90071-2007  
[Attorney for Bank of New York]

William Bues III  
McCormick, Doyle, Brown & Evers, LLP  
3400 Wilshire Boulevard, 15th Floor  
Los Angeles, California 90010-3223  
[Counsel for Reliant Energy, Inc.]

William C. Morrison-Knox  
Michael D. Prough  
Robert M. Yarn, Jr.  
Korston-Knox Bullen Mendez & Prough, LLP  
3400 Wilshire Boulevard, 15th Floor  
Los Angeles, California 90010-3223  
[Counsel for National Union Fire Insurance Company of Pittsburgh, PA]

William E. Kachner III  
Yale K. Kim  
Steven E. Rik  
Wynn LLP  
777 South Figueroa Street, Suite 2700  
Los Angeles, CA 90017

William J. Flynn  
Nepfart, Anderson, Freitas, Flynn & Grobholz  
1111 Broadway, Suite 2800  
San Francisco, California 94104  
[Counsel for BSW Local #1245]

William M. Goodman  
Lyle C. Yee  
Tye & Goodman  
1111 Broadway, Suite 2800  
San Francisco, California 94104

William M. Rose-Hawkins  
Phillips, Lytle, Hitchcock, Blaine & Huber  
437 Madison Avenue, 14th Floor  
New York, NY 10022  
[Counsel for HSBC Bank USA]

William P. Wengrich  
Paula Sheng Zhai Young & Jones  
Three Embarcadero Center, Suite 1020  
San Francisco, California 94111  
[Counsel for PG&E Corp.]

Am. Jelf Shorter  
TXU Energy Trading Company  
1717 Main Street  
Dallas, Texas 75201

Am. Jelf Shorter  
U.S. Bank  
Corporate Trust Services  
Attn: LaDonna Morrison  
180 East Fifth St., 3rd Floor  
St. Paul, MN 55101

U.S. Nuclear Regulatory Commission  
Attn: Document Control Desk  
Washington, DC 20555-0001

U.S. Trust Company National Association  
One Embarcadero Center, Suite 2000  
San Francisco, CA 94111-3709  
[Counsel for KRC Bank]

US Bank, Corporate Trust Services  
LaDonna Morrison  
P.O. Box 64111  
St. Paul, MN 55164-0111

Vicco Wild  
Law Office of Vicco Wild  
600 Third Avenue, Suite 1  
San Francisco, California 94104  
[Counsel for Kim Credit]

Victoria Leng  
AT&T Corp.  
793 Folium Street, 2nd Floor  
San Francisco, California 94107  
[Counsel for AT&T Corp.]

W. Austin Cooper  
James M. Grudner  
Cooper & Grudner  
2535 Capital Oaks Drive, Suite 100  
Sacramento, California 95833  
[Counsel for Larry M. Brey]

W. Austin Cooper  
Span & Gillon, LLC  
The Zinner Building  
2117 Second Avenue North  
Birmingham, Alabama 35203  
[Attorney for Dresser Industries, Inc.]

Walter J. Lock  
Engstrom, Lapson & Lock  
10100 Santa Monica Blvd., Floor 16  
Los Angeles, California 90067  
[Counsel for Cheryl Ann Acosta]

Wendy J. Hagana  
Wendy J. Hagana, Fraser & Murphy  
1600 Peachtree Street, N.E.  
Atlanta, GA 30303  
[Counsel for Encon Inc.]

Am. Jelf Shorter  
The Law Office of Joel K. Belsky  
213 Montgomery Street, Suite 715  
San Francisco, California 94104  
[Counsel for Denny's Inc.]

The Dabrowski Trust Fund, Inc.  
1222 14th Avenue South, Suite 204  
Birmingham, AL 35205

Matthew P. Lewis  
White & Case LLP  
633 West Fifth St., Suite 1900  
Los Angeles, California 90017  
[Counsel for KRC Bank]

Andrew P. Donahue  
White & Case LLP  
1135 Avenue of the Americas  
New York, NY 10020  
[Counsel for KRC Bank]

Andrew Silverstein  
Seward & Kessel LLP  
One Battery Park Plaza  
New York, NY 10004  
[Counsel for Bankers Trust Company of California]

Robert F. Fryer  
Peter Morse  
Bankers Trust Company  
Four Albany Street  
New York, NY 10006

Brian M. Kandel  
Brow & Kandel LLP  
1414 Sausal Avenue, Suite 203  
Santa Cruz, California 95062  
[Counsel for Ken Landis et al.]

Eric Wilton  
Robert C. Sheffield  
Korston-Knox Bullen Mendez & Prough, LLP  
777 South Figueroa Street, Suite 2700  
Los Angeles, California 90017  
[Counsel for Sealife Senior Income Fund]

Avila Valley Advisory Council  
c/o Neil Tardiff  
Smith Tardiff & Cusack  
Post Office Box 100  
San Luis Obispo, California 93406  
[Counsel for Avila Valley Advisory Council]

Patricia Kelly  
Anderson, Bies & Kelly  
577 Sutter Avenue, 2nd Floor  
Campbell, California 95008  
[Counsel for Mirra Station]

Thomas C. Walsh  
TXU Capital Corporation  
325 Summer Street  
Boston, MA 02110

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Ripon Corporation, Inc.]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Thomas E. Leura  
Jerry R. Bloom  
Brian L. Holman  
White & Case LLP  
633 West Fifth Street, 19th Floor  
Los Angeles, California 90071  
[Counsel for Oakdale Energy LLC]

Paul G. Kerkorian  
725 W. Brentwood Avenue, Suite 108  
Fremont, California 94704

Tom Milne  
State of Tennessee  
11th Floor, Andrew Jackson Bldg  
Nashville, Tennessee 37243

Am. Jelf Shorter  
TXU Energy Trading Company  
1717 Main Street  
Dallas, Texas 75201

Am. Jelf Shorter  
U.S. Bank  
Corporate Trust Services  
Attn: LaDonna Morrison  
180 East Fifth St., 3rd Floor  
St. Paul, MN 55101

U.S. Nuclear Regulatory Commission  
Attn: Document Control Desk  
Washington, DC 20555-0001

U.S. Trust Company National Association  
One Embarcadero Center, Suite 2000  
San Francisco, CA 94111-3709  
[Counsel for KRC Bank]

US Bank, Corporate Trust Services  
LaDonna Morrison  
P.O. Box 64111  
St. Paul, MN 55164-0111

Vicco Wild  
Law Office of Vicco Wild  
600 Third Avenue, Suite 1  
San Francisco, California 94104  
[Counsel for Kim Credit]

Victoria Leng  
AT&T Corp.  
793 Folium Street, 2nd Floor  
San Francisco, California 94107  
[Counsel for AT&T Corp.]

W. Austin Cooper  
James M. Grudner  
Cooper & Grudner  
2535 Capital Oaks Drive, Suite 100  
Sacramento, California 95833  
[Counsel for Larry M. Brey]

W. Austin Cooper  
Span & Gillon, LLC  
The Zinner Building  
2117 Second Avenue North  
Birmingham, Alabama 35203  
[Attorney for Dresser Industries, Inc.]

Walter J. Lock  
Engstrom, Lapson & Lock  
10100 Santa Monica Blvd., Floor 16  
Los Angeles, California 90067  
[Counsel for Cheryl Ann Acosta]

Wendy J. Hagana  
Wendy J. Hagana, Fraser & Murphy  
1600 Peachtree Street, N.E.  
Atlanta, GA 30303  
[Counsel for Encon Inc.]

Am. Jelf Shorter  
The Law Office of Joel K. Belsky  
213 Montgomery Street, Suite 715  
San Francisco, California 94104  
[Counsel for Denny's Inc.]

The Dabrowski Trust Fund, Inc.  
1222 14th Avenue South, Suite 204  
Birmingham, AL 35205

Matthew P. Lewis  
White & Case LLP  
633 West Fifth St., Suite 1900  
Los Angeles, California 90017  
[Counsel for KRC Bank]

Andrew P. Donahue  
White & Case LLP  
1135 Avenue of the Americas  
New York, NY 10020  
[Counsel for KRC Bank]

Andrew Silverstein  
Seward & Kessel LLP  
One Battery Park Plaza  
New York, NY 10004  
[Counsel for Bankers Trust Company of California]

Robert F. Fryer  
Peter Morse  
Bankers Trust Company  
Four Albany Street  
New York, NY 10006

Brian M. Kandel  
Brow & Kandel LLP  
1414 Sausal Avenue, Suite 203  
Santa Cruz, California 95062  
[Counsel for Ken Landis et al.]

Eric Wilton  
Robert C. Sheffield  
Korston-Knox Bullen Mendez & Prough, LLP  
777 South Figueroa Street, Suite 2700  
Los Angeles, California 90017  
[Counsel for Sealife Senior Income Fund]

Avila Valley Advisory Council  
c/o Neil Tardiff  
Smith Tardiff & Cusack  
Post Office Box 100  
San Luis Obispo, California 93406  
[Counsel for Avila Valley Advisory Council]

Patricia Kelly  
Anderson, Bies & Kelly  
577 Sutter Avenue, 2nd Floor  
Campbell, California 95008  
[Counsel for Mirra Station]

Am. Jelf Shorter  
TXU Energy Trading Company  
1717 Main Street  
Dallas, Texas 75201

Am. Jelf Shorter  
U.S. Bank  
Corporate Trust Services  
Attn: LaDonna Morrison  
180 East Fifth St., 3rd Floor  
St. Paul, MN 55101

U.S. Nuclear Regulatory Commission  
Attn: Document Control Desk  
Washington, DC 20555-0001

U.S. Trust Company National Association  
One Embarcadero Center, Suite 2000  
San Francisco, CA 94111-3709  
[Counsel for KRC Bank]

US Bank, Corporate Trust Services  
LaDonna Morrison  
P.O. Box 64111  
St. Paul, MN 55164-0111

Vicco Wild  
Law Office of Vicco Wild  
600 Third Avenue, Suite 1  
San Francisco, California 94104  
[Counsel for Kim Credit]

Victoria Leng  
AT&T Corp.  
793 Folium Street, 2nd Floor  
San Francisco, California 94107  
[Counsel for AT&T Corp.]

W. Austin Cooper  
James M. Grudner  
Cooper & Grudner  
2535 Capital Oaks Drive, Suite 100  
Sacramento, California 95833  
[Counsel for Larry M. Brey]

W. Austin Cooper  
Span & Gillon, LLC  
The Zinner Building  
2117 Second Avenue North  
Birmingham, Alabama 35203  
[Attorney for Dresser Industries, Inc.]

Walter J. Lock  
Engstrom, Lapson & Lock  
10100 Santa Monica Blvd., Floor 16  
Los Angeles, California 90067  
[Counsel for Cheryl Ann Acosta]

Wendy J. Hagana  
Wendy J. Hagana, Fraser & Murphy  
1600 Peachtree Street, N.E.  
Atlanta, GA 30303  
[Counsel for Encon Inc.]

Am. Jelf Shorter  
The Law Office of Joel K. Belsky  
213 Montgomery Street, Suite 715  
San Francisco, California 94104  
[Counsel for Denny's Inc.]

The Dabrowski Trust Fund, Inc.  
1222 14th Avenue South, Suite 204  
Birmingham, AL 35205

Matthew P. Lewis  
White & Case LLP  
633 West Fifth St., Suite 1900  
Los Angeles, California 90017  
[Counsel for KRC Bank]

Andrew P. Donahue  
White & Case LLP  
1135 Avenue of the Americas  
New York, NY 10020  
[Counsel for KRC Bank]

Andrew Silverstein  
Seward & Kessel LLP  
One Battery Park Plaza  
New York, NY 10004  
[Counsel for Bankers Trust Company of California]

Robert F. Fryer  
Peter Morse  
Bankers Trust Company  
Four Albany Street  
New York, NY 10006

Brian M. Kandel  
Brow & Kandel LLP  
1414 Sausal Avenue, Suite 203  
Santa Cruz, California 95062  
[Counsel for Ken Landis et al.]

Eric Wilton  
Robert C. Sheffield  
Korston-Knox Bullen Mendez & Prough, LLP  
777 South Figueroa Street, Suite 2700  
Los Angeles, California 90017  
[Counsel for Sealife Senior Income Fund]

Avila Valley Advisory Council  
c/o Neil Tardiff  
Smith Tardiff & Cusack  
Post Office Box 100  
San Luis Obispo, California 93406  
[Counsel for Avila Valley Advisory Council]

Patricia Kelly  
Anderson, Bies & Kelly  
577 Sutter Avenue, 2nd Floor  
Campbell, California 95008  
[Counsel for Mirra Station]

Am. Jelf Shorter  
TXU Energy Trading Company  
1717 Main Street  
Dallas, Texas 75201

Am. Jelf Shorter  
U.S. Bank  
Corporate Trust Services  
Attn: LaDonna Morrison  
180 East Fifth St., 3rd Floor  
St. Paul, MN 55101

U.S. Nuclear Regulatory Commission  
Attn: Document Control Desk  
Washington, DC 20555-0001

U.S. Trust Company National Association  
One Embarcadero Center, Suite 2000  
San Francisco, CA 94111-3709  
[Counsel for KRC Bank]

US Bank, Corporate Trust Services  
LaDonna Morrison  
P.O. Box 64111  
St. Paul, MN 55164-0111

Vicco Wild  
Law Office of Vicco Wild  
600 Third Avenue, Suite 1  
San Francisco, California 94104  
[Counsel for Kim Credit]

Victoria Leng  
AT&T Corp.  
793 Folium Street, 2nd Floor  
San Francisco, California 94107  
[Counsel for AT&T Corp.]

W. Austin Cooper  
James M. Grudner  
Cooper & Grudner  
2535 Capital Oaks Drive, Suite 100  
Sacramento, California 95833  
[Counsel for Larry M. Brey]

W. Austin Cooper  
Span & Gillon, LLC  
The Zinner Building  
2117 Second Avenue North  
Birmingham, Alabama 35203  
[Attorney for Dresser Industries, Inc.]

Walter J. Lock  
Engstrom, Lapson & Lock  
10100 Santa Monica Blvd., Floor 16  
Los Angeles, California 90067  
[Counsel for Cheryl Ann Acosta]

Wendy J. Hagana  
Wendy J. Hagana, Fraser & Murphy  
1600 Peachtree Street, N.E.  
Atlanta, GA 30303  
[Counsel for Encon Inc.]

Am. Jelf Shorter  
The Law Office of Joel K. Belsky  
213 Montgomery Street, Suite 715  
San Francisco, California 94104  
[Counsel for Denny's Inc.]

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Birmingham, AL 35205

Matthew P. Lewis  
White & Case LLP  
633 West Fifth St., Suite 1900  
Los Angeles, California 90017  
[Counsel for KRC Bank]

Andrew P. Donahue  
White & Case LLP  
1135 Avenue of the Americas  
New York, NY 10020  
[Counsel for KRC Bank]

Andrew Silverstein  
Seward & Kessel LLP  
One Battery Park Plaza  
New York, NY 10004  
[Counsel for Bankers Trust Company of California]

Robert F. Fryer  
Peter Morse  
Bankers Trust Company  
Four Albany Street  
New York, NY 10006

Brian M. Kandel  
Brow & Kandel LLP  
1414 Sausal Avenue, Suite 203  
Santa Cruz, California 95062  
[Counsel for Ken Landis et al.]

Eric Wilton  
Robert C. Sheffield  
Korston-Knox Bullen Mendez & Prough, LLP  
777 South Figueroa Street, Suite 2700  
Los Angeles, California 90017  
[Counsel for Sealife Senior Income Fund]

Avila Valley Advisory Council  
c/o Neil Tardiff  
Smith Tardiff & Cusack  
Post Office Box 100  
San Luis Obispo, California 93406  
[Counsel for Avila Valley Advisory Council]

Patricia Kelly  
Anderson, Bies & Kelly  
577 Sutter Avenue, 2nd Floor  
Campbell, California 95008  
[Counsel for Mirra Station]

Am. Jelf Shorter  
TXU Energy Trading Company  
1717 Main Street  
Dallas, Texas 75201

Am. Jelf Shorter  
U.S. Bank  
Corporate Trust Services  
Attn: LaDonna Morrison  
180 East Fifth St., 3rd Floor  
St. Paul, MN 55101

U.S. Nuclear Regulatory Commission  
Attn: Document Control Desk  
Washington, DC 20555-0001

U.S. Trust Company National Association  
One Embarcadero Center, Suite 2000  
San Francisco, CA 94111-3709  
[Counsel for KRC Bank]

US Bank, Corporate Trust Services  
LaDonna Morrison  
P.O. Box 64111  
St. Paul, MN 55164-0111

Vicco Wild  
Law Office of Vicco Wild  
600 Third Avenue, Suite 1  
San Francisco, California 94104  
[Counsel for Kim Credit]

Victoria Leng  
AT&T Corp.  
793 Folium Street, 2nd Floor  
San Francisco, California 94107  
[Counsel for AT&T Corp.]

W. Austin Cooper  
James M. Grudner  
Cooper & Grudner  
2535 Capital Oaks Drive, Suite 100  
Sacramento, California 95833  
[Counsel for Larry M. Brey]

W. Austin Cooper  
Span & Gillon, LLC  
The Zinner Building  
2117 Second Avenue North  
Birmingham, Alabama 35203  
[Attorney for Dresser Industries, Inc.]

Walter J. Lock  
Engstrom, Lapson & Lock  
10100 Santa Monica Blvd., Floor 16  
Los Angeles, California 90067  
[Counsel for Cheryl Ann Acosta]

Wendy J. Hagana  
Wendy J. Hagana, Fraser & Murphy  
1600 Peachtree Street, N.E.  
Atlanta, GA 30303  
[Counsel for Encon Inc.]

Am. Jelf Shorter  
The Law Office of Joel K. Belsky  
213 Montgomery Street, Suite 715  
San Francisco, California 94104  
[Counsel for Denny's Inc.]

The Dabrowski Trust Fund, Inc.  
1222 14th Avenue South, Suite 204  
Birmingham, AL 35205

Matthew P. Lewis  
White & Case LLP  
633 West Fifth St., Suite 1900  
Los Angeles, California 90017  
[Counsel for KRC Bank]

Andrew P. Donahue  
White & Case LLP  
1135 Avenue of the Americas  
New York, NY 10020  
[Counsel for KRC Bank]

Andrew Silverstein  
Seward & Kessel LLP  
One Battery Park Plaza  
New York, NY 10004  
[Counsel for Bankers Trust Company of California]

Robert F. Fryer  
Peter Morse  
Bankers Trust Company  
Four Albany Street  
New York, NY 10006

Brian M. Kandel  
Brow & Kandel LLP  
1414 Sausal Avenue, Suite 203  
Santa Cruz, California 95062  
[Counsel for Ken Landis et al.]

Eric Wilton  
Robert C. Sheffield  
Korston-Knox Bullen Mendez & Prough, LLP  
777 South Figueroa Street, Suite 2700  
Los Angeles, California 90017  
[Counsel for Sealife Senior Income Fund]

Avila Valley Advisory Council  
c/o Neil Tardiff  
Smith Tardiff & Cusack  
Post Office Box 100  
San Luis Obispo, California 93406  
[Counsel for Avila Valley Advisory Council]

Patricia Kelly  
Anderson, Bies & Kelly  
577 Sutter Avenue, 2nd Floor  
Campbell, California 95008  
[Counsel for Mirra Station]

Am. Jelf Shorter  
TXU Energy Trading Company  
1717 Main Street  
Dallas, Texas 75201

Am. Jelf Shorter  
U.S. Bank  
Corporate Trust Services  
Attn: LaDonna Morrison  
180 East Fifth St., 3rd Floor  
St. Paul, MN 55101

U.S. Nuclear Regulatory Commission  
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U.S. Trust Company National Association  
One Embarcadero Center, Suite 2000  
San Francisco, CA 94111-3709  
[Counsel for KRC Bank]

US Bank, Corporate Trust Services  
LaDonna Morrison  
P.O. Box 64111  
St. Paul, MN 55164-0111

Vicco Wild  
Law Office of Vicco Wild  
600 Third Avenue, Suite 1  
San Francisco, California 94104  
[Counsel for Kim Credit]

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AT&T Corp.  
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San Francisco, California 94107  
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Sacramento, California 95833  
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Span & Gillon, LLC  
The Zinner Building  
2117 Second Avenue North  
Birmingham, Alabama 35203  
[Attorney for Dresser Industries, Inc.]

Walter J. Lock  
Engstrom, Lapson & Lock  
10100 Santa Monica Blvd., Floor 16  
Los Angeles, California 90067  
[Counsel for Cheryl Ann Acosta]

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1600 Peachtree Street, N.E.  
Atlanta, GA 30303  
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The Law Office of Joel K. Belsky  
213 Montgomery Street, Suite 715  
San Francisco, California 94104  
[Counsel for Denny's Inc.]

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Birmingham, AL 35205

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White & Case LLP  
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New York, NY 10020  
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Bankers Trust Company  
Four Albany Street  
New York, NY 10006

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Brow & Kandel LLP  
1414 Sausal Avenue, Suite 203  
Santa Cruz, California 95062  
[Counsel for Ken Landis et al.]

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Korston-Knox Bullen Mendez & Prough, LLP  
777 South Figueroa Street, Suite 2700  
Los Angeles, California 90017  
[Counsel for Sealife Senior Income Fund]

Avila Valley Advisory Council  
c/o Neil Tardiff  
Smith Tardiff & Cusack  
Post Office Box 100  
San Luis Obispo, California 93406  
[Counsel for Avila Valley Advisory Council]

Patricia Kelly  
Anderson, Bies & Kelly  
577 Sutter Avenue, 2nd Floor  
Campbell, California 95008  
[Counsel for Mirra Station]

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U.S. Bank  
Corporate Trust Services  
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St. Paul, MN 55101

U.S. Nuclear Regulatory Commission  
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U.S. Trust Company National Association  
One Embarcadero Center, Suite 2000  
San Francisco, CA 94111-3709  
[Counsel for KRC Bank]

US Bank, Corporate Trust Services  
LaDonna Morrison  
P.O. Box 64111  
St. Paul, MN 55164-0111

Vicco Wild  
Law Office of Vicco Wild  
600 Third Avenue, Suite 1  
San Francisco, California 94104  
[Counsel for Kim Credit]

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AT&T Corp.  
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San Francisco, California 94107  
[Counsel for AT&T Corp.]

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Birmingham, Alabama 35203  
[Attorney for Dresser Industries, Inc.]

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Los Angeles, California 90067  
[Counsel for Cheryl Ann Acosta]

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Atlanta, GA 30303  
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New York, NY 10020  
[Counsel for KRC Bank]

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Seward & Kessel LLP  
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New York, NY 10004  
[Counsel for Bankers Trust Company of California]

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Bankers Trust Company  
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New York, NY 10006

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Brow & Kandel LLP  
1414 Sausal Avenue, Suite 203  
Santa Cruz, California 95062  
[Counsel for Ken Landis et al.]

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777 South Figueroa Street, Suite 2700  
Los Angeles, California 90017  
[Counsel for Sealife Senior Income Fund]

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c/o Neil Tardiff  
Smith Tardiff & Cusack  
Post Office Box 100  
San Luis Obispo, California 93406  
[Counsel for Avila Valley Advisory Council]

Patricia Kelly  
Anderson, Bies & Kelly  
577 Sutter Avenue, 2nd Floor  
Campbell, California 95008  
[Counsel for Mirra Station]